

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 03-18**

May 29, 2003

RE: May individuals employed through Memorandums of Agreement accept compensation for services provided on their own time?

DECISION: No, if a part of official duty to provide such service.  
Yes, if management has determined that it is not part of the individual's official duty to provide such a service.

This opinion is issued in response to your April 1, 2003, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 29, 2003, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Kentucky Department of Education ("Education") employs local educators to work for the Department of Education via Memorandums of Agreement (MOA) with their respective school districts. These individuals are not employed through the state personnel system, but rather are "contract" employees. You ask if such individuals may be compensated for educational-related services they provide on their "own" time to other organizations.

KRS 11A.040(5) provides:

(5) A public servant shall not knowingly accept compensation, other than that provided by law for public servants, for performance of his official duties without the prior approval of the commission.

Additionally, "public servant" and "officer" are defined in KRS 11A.010(9) and (7) respectively as follows:

(9) "Public servant" means:

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- (a) The Governor;
- (b) The Lieutenant Governor;
- (c) The Secretary of State;
- (d) The Attorney General;
- (e) The Treasurer;
- (f) The Commissioner of Agriculture;
- (g) The Auditor of Public Accounts; and
- (h) All employees in the executive branch including officers as defined in subsection (7) of this section and merit employees;

(7) "Officer" means all major management personnel in the executive branch of state government, including the secretary of the cabinet, the Governor's chief executive officers, cabinet secretaries, deputy cabinet secretaries, general counsels, commissioners, deputy commissioners, principal assistants, division directors, members and full-time chief administrative officers of the Parole Board, Board of Tax Appeals, Board of Claims, Kentucky Retirement Systems board of trustees, Public Service Commission, Worker's Compensation Board and its administrative law judges, the Occupational Safety and Health Review Commission, the Kentucky Board of Education, the State Board for Adult and Technical Education, the Council on Postsecondary Education, and any person who holds a personal service contract to perform on a full-time basis for a period of time not less than six (6) months a function of any position listed in this subsection;

According to the definition of "officer" stated above, if an individual is hired via a contract to perform a service fulfilling the position of an officer on a full-time basis for not less than six months, the individual is considered an officer, and thus is a public servant. In Advisory Opinions 98-19 and 01-37 (copies of which are enclosed) an employee of a university hired by a state agency through an MOA with the university was considered to be a public servant, even though the contract for services was not directly between the employee and the state agency, but was between the university and the state agency. Furthermore, in Advisory Opinion 93-84 (also

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enclosed) the Commission concluded that contract employees of Education were considered executive branch employees. Thus, if an individual is hired through an MOA with his local school district to fulfill a position in Education on a full-time basis for a period of not less than six months, even if the position is not an officer position, the Commission believes that, in substance, the individual is a public servant and is subject to the requirements of the Executive Branch Code of Ethics found in KRS Chapter 11A.

Applying KRS 11A.040(5) to the situation presented above, the Commission looks to Advisory Opinion 02-17 (a copy of which is enclosed). In this opinion, an employee was advised that if it was a part of his official duty to provide training classes for coal companies, then he should not accept compensation for such training, even if provided off-site and during hours other than normal working hours. Similarly, the Commission believes that Education employees may not be compensated for educational-related services to others if it is a part of their official duties for Education to provide such services. However, if the services the Education employees wish to provide to others are not duties that management has determined are a part of their official duties, then it appears that the employees would not be prohibited from accepting compensation for such services, provided they do not use state time, equipment, or materials to provide such services.

Additionally, in order to avoid any conflicts of interest pursuant to KRS 11A.020 (1), cited below, Education employees must not be directly involved, as part of their official duties, in any matters affecting any persons, businesses, school districts, or other entities by which they will be compensated privately. The Commission also recommends that Education take steps to ensure that both full-time and part-time educators employed through MOAs are not involved in matters that affect the school district through which Education contracts for their services.

- (1) No public servant, by himself or through others, shall knowingly:
  - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
  - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

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(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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BY CHAIR: Joseph B. Helm, Jr.

Enclosures: Advisory Opinion 98-19  
Advisory Opinion 01-37  
Advisory Opinion 93-84  
Advisory Opinion 02-17